UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL-W DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. TIMOTHY JOHN VAUDT, *aka* "Fudd," Defendant.	No. CR03-3060 MWB **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

I. INTRODUCTION

This matter is before the court on a Motion to Suppress filed by the defendant Timothy Vaudt ("Vaudt") on February 10, 2004 (Doc. No. 31). The plaintiff (the "Government") filed a resistance to the motion on February 17, 2004 (Doc. No. 34). Pursuant to the trial scheduling order entered September 26, 2003 (Doc. No. 13), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge for the filing of a report and recommended disposition.

The court held a hearing on the motion on February 18, 2004, at which Assistant U.S. Attorney Shawn Wehde appeared on behalf of the Government, and Vaudt appeared in person with his attorney, James Cook. The Government offered the testimony of Calhoun County Sheriff William A. Davis. Vaudt called Deputy Sheriff Kendall R. Holm. as a witness The following exhibits were admitted into evidence: Gov't Exs. 1-20, photographs of Vaudt's residence, the surrounding area, and various items seized during

a search of the residence and vehicles; Gov't Ex. 21, Application for Search Warrant with attachments (16 pages); Gov't Ex. 22, Search Warrant (2 pages); Gov't Ex. 23, Return of Service with attachments (8 pages); and Gov't Ex. 24, a sketch of Vaudt's residence and surrounding area as of the date of the search.

The court has considered the evidence, the parties' briefs, and the arguments of counsel, and now submits the following report and recommended disposition of Vaudt's motion to suppress.

Preliminarily, the Government has pointed out, and the court acknowledges, that Vaudt's motion to suppress was filed out of time. Vaudt retained new counsel, who entered his appearance in this case on February 5, 2004. Counsel promptly moved, on February 9, 2004, for leave to file a motion to suppress out of time. (Doc. No. 29) The court granted the motion and scheduled the matter for hearing. (Doc. No. 30) Therefore, the court overrules the Government's objection to the late filing of the motion. (*See* Doc. No. 34, ¶ 1)

II. VAUDT'S CLAIMS; FINDINGS OF FACT

On August 21, 2003, Vaudt was charged in a two-count Indictment with conspiracy to manufacture and distribute methamphetamine within 1,000 feet of a public playground, and possession of a firearm in connection with a drug trafficking crime. (*See* Doc. No. 1) The charges against Vaudt are supported by evidence seized in the execution of a search warrant (Gov't Ex. 22) at his home in Rinard, Iowa, on August 21, 2002.[1] The search warrant was issued by a magistrate in Calhoun County, Iowa. In his motion to suppress, Vaudt challenges the validity of the search warrant. He argues that based on the

[1] At the hearing, counsel for the Government corrected an error in the Government's resistance and brief, both of which list the date of the warrant as 2003, rather than 2002.

information contained with the four corners of the affidavit supporting the warrant application (Gov't Ex. 21), the magistrate lacked probable cause to issue the warrant. At the hearing, Vaudt argued further that the holding of the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), is wrong, and the *Leon* good faith exception should not be applied in the present case.

Vaudt also asserted an argument under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), attacking the warrant application on the basis that Sheriff Davis could not have detected a chemical smell in smoke coming from Vaudt's house from a distance of fifty to 100 feet away. Although the court found Vaudt had failed to make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," as required by *Franks*, 428 U.S. at 155-56, 98 S. Ct. at 2676, the court nevertheless allowed the parties to present evidence related to the issue to make a complete record for purposes of this Report and Recommendation.

At the hearing, the parties elicited factual testimony relating to Vaudt's claims. From the testimony and the exhibits, the court makes the following findings of fact.

In the early morning hours of August 21, 2002, Sheriff Davis was patrolling Rinard, Iowa, in an unmarked car. At about 6:00 a.m., he drove by Vaudt's house and noticed two exhaust fans in the basement window on the south side of the residence. He drove around the house again and noticed a thick, white smoke coming out of the exhaust fans. Sheriff Davis parked his car facing north on the street that runs by the house, about fifty to 100 feet from the windows where the exhaust fans were located. As he watched, a breeze swirled the smoke around and blew it toward where he was parked. He drove his car forward slightly and rolled down his window to see if he could detect the odor of ether

or anhydrous ammonia, which he knew were used in manufacturing methamphetamine. When the smoke reached him, he thought he detected a faint chemical smell.

Sheriff Davis observed a gray Buick Skylark automobile parked in the driveway or alleyway beside the Vaudt residence. He checked the license and learned the vehicle was registered to a Eugene Schneider of Vail, Iowa. The sheriff was aware that the Webster County Sheriff's office had conducted a methamphetamine lab search several months earlier at the Schneider residence south of Gowrie, Iowa. Sheriff Davis also had received information from Webster County authorities that Vaudt was allowing people to use his residence to manufacture methamphetamine, and was selling anhydrous ammonia to methamphetamine manufacturers.

Sheriff Davis called Deputy Holm and asked him to come to the scene to assist him. While the sheriff was waiting for Deputy Holm to arrive, he saw a female subject with short, black hair, walk from the back of the Vaudt residence, and place a yellow sack inside the Buick automobile. The woman then went back inside the Vaudt house.

Deputy Holm arrived at the scene at about 7:00 a.m. Sheriff Davis and Deputy Holm went to the back door of the Vaudt residence and knocked on the door. Teresa Schneider answered the door. She stated she had been sleeping, and stated Vaudt was not home. Sheriff Davis recognized Schneider as the person he had seen placing the yellow sack inside the Buick, and he told her he had just seen her outside the house at 6:30 a.m. The sheriff also told Schneider he had information that she was involved in manufacturing methamphetamine. Schneider admitted she had helped manufacture methamphetamine on a couple of occasions.

Sheriff Davis asked Schneider what was in the yellow sack she had placed in the car. Schneider hesitated at first, but then showed the officers the sack. Inside the sack was a plastic container containing a small quantity of "mud" (residue) from manufacturing

methamphetamine. Schneider stated she was supposed to get rid of the mud. She told the officers she had seen Sheriff Davis drive by and had told Vaudt, who then left the house through the back door.

Deputy Holm asked Schneider if he could look inside a white cooler that was in the back seat of the Buick. Schneider consented. In and adjacent to the cooler, the officers found a bicycle innertube, PVC pipe, duct tape, a red gasoline container, rubber gloves, and a plastic sack full of empty packages of pseudoephedrine. The officers knew these items were commonly used in stealing anhydrous ammonia, and in manufacturing methamphetamine.

Schneider asked the officers if she could go back inside the house to retrieve her cigarettes. Deputy Holm stated she could only do so if he accompanied her. He testified he wanted to "keep an eye" on Schneider until a search warrant was obtained, both for purposes of officer safety and to prevent the destruction of any evidence. Schneider consented to Deputy Holm's entry into the residence, and he followed her into the house. They entered the kitchen, which is a few feet inside the back door, and Schneider retrieved her cigarettes and got a drink of water. She and Deputy Holm then exited the residence. While Deputy Holm was in the house, he detected a slight odor he believed to be anhydrous ammonia.

Deputy Holm had Schneider empty her pockets, and she had a rubber glove in her pocket. The officers knew methamphetamine manufacturers wear rubber gloves to prevent burns when they are stealing anhydrous ammonia. Schneider told Deputy Holm she was low on cash, and she had been considering stealing some anhydrous ammonia for "a friend of a friend of a friend."

Based on these facts, the officers applied for a warrant to search Vaudt's residence in Rinard, Iowa; an attached garage and vehicles; and Schneider's Buick. (*See* Gov't

Ex. 21) A search warrant was issued (Gov't Ex. 22), and during their search of the house, officers found several items commonly used in manufacturing methamphetamine, drug paraphernalia, a police scanner, and several handguns and ammunition. (*See* Gov't Ex. 23, pp. 2-4)

III. ANALYSIS

A. Standard of Review

The United States Supreme Court has set the standard for review of a search warrant application, as follows:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States,]* 309 U.S. [410,] 419, 89 S. Ct. [1509,] 590[, 21 L. Ed. 2d 637 (1969)]. "A grudging or negative attitude by reviewing courts toward warrants," *[United States v.] Ventresca*, 380 U.S. [102,] 108, 85 S. Ct. [741,] 745, [13 L. Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, [380 U.S.] at 109, 85 S. Ct. at 746.
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> . . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960). *See United States v. Harris*, 403 U.S.

> 573, 577-583, 91 S. Ct. 2075, 2079-2082, 29 L. Ed. 2d 723 (1971). [FN10]
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> [FN10] We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *Ventresca*, *supra*, 380 U.S. at 109, 85 S. Ct. at 746. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317, 2331 & n.10, 76 L. Ed. 2d 527 (1983).

Thus, the scope of this court's review of the search warrant in this case is limited to a determination of whether the magistrate had a "substantial basis" to conclude a search would uncover evidence of wrongdoing. In conducting this review, the court is mindful that

> affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law have no proper place in this area." *Ventresca, supra*, 380 U.S. at 108, 85 S. Ct. at 745. . . . [M]any warrants are – quite properly . . . issued on the basis of nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings.

Gates, 462 U.S. at 235-36, 103 S. Ct. at 2331. As the Supreme Court further explained:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband

> or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States,* 362 U.S. [257,] 271, 80 S. Ct. [725,] 736[, 4 L. Ed. 2d 697 (1960)]. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the prior legal standard].

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332. *See also United States v. Fulgham*, 143 F.3d 399, 400-01 (8th Cir. 1998) ("When we review the sufficiency of an affidavit supporting a search warrant, great deference is accorded the issuing judicial officer. *See United States v. Day*, 949 F.2d 973, 977 (8th Cir. 1991).")

B. Probable Cause to Support the Warrant

Giving due deference to the magistrate's determination of probable cause, the court finds "the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing[.]" *Gates*, 462 U.S. at 236-37, 103 S. Ct. at 2331. The affidavit supporting the warrant application includes the following facts from which the magistrate, considering the totality of the circumstances, could find probable cause to issue the warrant:

* Sheriff Davis detected thick, white smoke with a slight chemical smell coming from the Vaudt residence. Vaudt argues the sheriff could not have detected a chemical odor from his vantage point. The court overrules this argument, finding the sheriff's testimony to be credible. Vaudt points out that during the search, officers found no evidence of recent methamphetamine manufacturing activities. However, the sources of the smoke and chemical smell are irrelevant to the sheriff's

reasonable suspicion that methamphetamine manufacturing might be taking place. For example, even if the smoke was actually steam from hot water, or condensation from an air conditioning unit, and the chemical smell was dry cleaning fluid or bug spray,[2] given the totality of the circumstances, the smoke and chemical odor added to the sheriff's reasonable suspicion that illegal activities might be taking place inside the Vaudt residence.

* A Buick automobile registered to Eugene Schneider was parked in the Vaudt driveway, and Sheriff Davis had information from other law enforcement sources that the Schneiders had been investigated for methamphetamine manufacturing in the past.

* Sheriff Davis saw a woman come from behind the house, put a yellow bag into the Buick, and return to the house. At the hearing, Sheriff Davis agreed with Vaudt's assertion that the sheriff could not tell whether the woman or the yellow sack actually came from inside the house. However, the sheriff saw the woman come around a privacy fence from the back of the house, put the sack in the car, and then return to the back of the house. A few minutes later, when the officers knocked on the back door of the house, the woman answered the door. The court finds it was reasonable for the sheriff to conclude the woman, the bag, and its contents came from inside the house. In addition, the sheriff's affidavit was scrupulously honest. Rather than stating the conclusion that the woman came out of the house, he stated he "observed what appeared to be a female subject with short black hair, come from the back side of Vaudt's residence and place a yellow sack in the gray Buick

[2]Sheriff Davis never identified the chemical smell as ether, anhydrous, or any other particular substance. He merely stated he detected a faint chemical odor.

Skylark." (Gov't Ex. 21) The court overrules Vaudt's argument that the sheriff's conclusions were unreasonable under the circumstances.

* Schneider showed the officers what was in the yellow sack: a plastic container containing "mud" residue from methamphetamine manufacturing, and she told the officers she was supposed to get rid of the mud.

* Schneider admitted her involvement in methamphetamine manufacturing activities.

* With Schneider's consent, the officers looked in the back seat of the Buick and inside a white cooler, and found numerous items commonly used to steal anhydrous ammonia and to manufacture methamphetamine.

* When Deputy Holm accompanied Schneider, with her consent, into the Vaudt residence, he detected a faint odor he believed to be anhydrous ammonia. Vaudt argues Schneider did not have the right to authorize Deputy Holm to enter the residence. He further argues that when Schneider invited the officers into the residence to look for Vaudt and they declined, they were evidencing knowledge that Schneider lacked authority to allow them into the house. Neither of these arguments is valid. Vaudt left Schneider alone in his home. He therefore assumed the risk that she might allow someone else into the residence. *See, e.g.*, *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 998, 993, 39 L. Ed. 2d 242 (1974); *United States v. Jaras*, 86 F.3d 383, 389 (5th Cir. 1996). "'[W]here two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either.'" *Matlock*, 415 U.S. at 169 n.4, 94 S. Ct. at 992 n.4 (quoting, with approval, *United States v. Sferas*, 210 F.2d 69, 74 (7th Cir.), *cert. denied sub nom. Skally v. United States*, 347 U.S. 935, 74 S. Ct. 630, 98 L. Ed. 1086 (1954)). Even if Schneider had less than an "equal right" to use or occupy Vaudt's home, the court finds,

paraphrasing *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000), that a reasonable person, with the same knowledge of the situation as that possessed by Sheriff Davis and Deputy Holm, would reasonably believe Schneider had the authority to invite them into the house. *Basinski*, 226 F.3d at 834 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir.1990)). *See Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 683 (1969) (Frazier allowed his cousin, Rawls, to use a duffel bag, which officers searched with Rawls's consent. Officers found evidence against Frazier in the bag. The Court held that "in allowing Rawls to use the bag and in leaving it in his house, [Frazier] must be taken to have assumed the risk that Rawls would allow someone else to look inside.").

* Schneider had a rubber glove in her pocket, and she admitted she was thinking about stealing anhydrous ammonia to get some money.

* The exhaust fans from which the white smoke emanated were on the north side of the house, opposite the side of the house where the dryer vent was located.

* Sheriff Davis had information from other law enforcement officers that Vaudt was suspected of letting people use his house to manufacture methamphetamine.[3]

* Sheriff Davis has training and experience in investigating and prosecuting numerous methamphetamine labs.

The court finds that considering the totality of the circumstances, the above facts were more than sufficient for the magistrate to find probable cause to issue the warrant.

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[3]The court notes that other than representing this information came from law enforcement officers, as opposed to a confidential informant, the warrant affidavit did not contain sufficient facts for the magistrate to determine the validity of this information. However, the magistrate could consider the information as part of the totality of the circumstances.

C. Leon Analysis

Even if there was insufficient information in the warrant application to support probable cause, if the officers executing the search warrant reasonably and in good faith relied on the warrant, then evidence obtained from the search should not be suppressed. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself (*e.g.*, where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.*, 468 U.S. at 923, 104 S. Ct. at 3421 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. As the *Leon* Court explained:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search.
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15, 104 S. Ct. at 3416 (internal citations omitted). The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142

(1964), and *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

Even if a magistrate improperly analyzes the totality of the circumstances in finding probable cause, under *Leon*, the exclusionary rule should not be applied to exclude evidence as a means of punishing or deterring an errant or negligent magistrate. The Supreme Court found that penalizing officers who act in good faith on a warrant for a magistrate's error in issuing the warrant "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921, 104 S. Ct. at 3419. The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
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> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

In the present case, Vaudt has failed to raise even a reasonable inference that the officers executing the search warrant either had knowledge, or properly could be charged with knowledge, that the warrant was not supported by probable cause. The warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421. Therefore, even if the magistrate's probable cause determination was in error, the court finds the officers reasonably and in good faith relied on the warrant.

IV. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections to this Report and Recommendation within 10 days of the date of the report and recommendation, that the defendant's motion to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections within 10 court days from this date. Any response to the objections must be served and filed within 5 court days after service of the objections.

If either party objects to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.

IT IS SO ORDERED.

DATED this 19th day of February, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT